

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

CHIBARDUN TELEPHONE COOPERATIVE, INC.
CTC TELCOM, INC.

CC Docket No. 97-219

Petition for Preemption Pursuant to
Section 253 of the Communications Act
of Discriminatory Ordinances, Fees
and Right-of-Way Practices of the
City of Rice Lake, Wisconsin

TO: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY OF
CHIBARDUN TELEPHONE COOPERATIVE, INC. AND CTC TELCOM, INC.

CHIBARDUN TELEPHONE COOPERATIVE, INC.
CTC TELCOM, INC.

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SUMMARY

Chibardun Telephone Cooperative, Inc. and its subsidiary (Chibardun) request the Commission to preempt the City of Rice Lake, Wisconsin (City) from continuing to refuse to process and grant Chibardun's excavation permit applications in accordance with its existing requirements and procedures, and from imposing additional permit requirements that prohibit Chibardun's provision of competitive telecommunications services in Rice Lake.

The Commission has jurisdiction under Sections 253(a) and 253(d) of the Act to preempt the City. Contrary to the City's characterization, this is not solely or primarily a dispute arising "out of public right-of-way management and compensation matters." Rather, Chibardun's preemption claim is based upon the fact that the City unlawfully has refused to process and grant the subject excavation under the City's existing ordinances and procedures. The City has singled out Chibardun as a new entrant, and has refused to grant Chibardun applications even though they are complete and in compliance with existing City requirements, and even though the City granted virtually all other permit applications on a "same day" basis during 1997.

Chibardun has standing to seek preemption, and has not withdrawn its permit applications. It has never requested such withdrawal, and has never been notified by the City that its pending applications were denied, rejected, dismissed or returned.

Chibardun's petition should not be dismissed as "premature," as GTE requests. Its entry into Rice Lake has already been delayed

until at least late 1998, and should not be delayed for another year or more by a dismissal that would serve only to perpetuate GTE's monopoly.

Chibardun has met its burden of demonstrating that the City has violated Section 253(a) of the Act, by showing: (1) that it needs excavation permits to construct its Rice Lake system; (b) that its May 19, 1997 applications fully satisfy the City's existing ordinances and procedures; and (c) that the City has refused to grant Chibardun's permits unless and until it accepts additional and onerous obligations and responsibilities. The City's refusal has directly prohibited Chibardun from providing telecommunications services in Rice Lake.

Review of the 98 excavation permit applications granted by the City during the first ten months of 1997 show that virtually all of these permits were granted in ministerial fashion on a "same day" basis. These permits indicate that the City has not significantly reviewed the applications of GTE and other entities; and that the City has been dealing with multiple permittees and users before and after Chibardun filed its application.

Finally, the additional requirements and obligations which the City has attempted to impose upon Chibardun are the antithesis of "competitive neutrality" and "nondiscrimination," and thus preclude the City from qualifying for the "safe harbor" in Section 253(c).

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TO: The Commission		

REPLY OF
CHIBARDUN TELEPHONE COOPERATIVE, INC. AND CTC TELCOM, INC.

Chibardun Telephone Cooperative, Inc. and its subsidiary CTC Telcom, Inc. (collectively, Chibardun) reply in support of their request for a Commission order under Section 253(a) of the Communications Act, preempting the City of Rice Lake, Wisconsin (City) from continuing to refuse to process and grant Chibardun's excavation permit applications in accordance with its existing requirements and procedures, and from otherwise prohibiting Chibardun's provision of competitive telecommunications services in Rice Lake.

This proceeding is a tale of two rural communities in northwestern Wisconsin (Barron and Rice Lake, Wisconsin), as well as a test of the Commission's right and power to prevent local governments from imposing additional restrictions and conditions upon prospective new entrants in order to deny, or delay for long periods, their ability to provide competitive telecommunications services.

In March, 1997, Chibardun approached the governments of both Rice Lake (1990 population: 7,998) and Barron (1990 population: 2,986), and proposed to construct new telecommunications systems to compete with the existing GTE systems in the communities.¹ The City responded by doing everything possible to delay, discourage, increase the cost, and deny Chibardun's entry -- and thus far has succeeded in keeping Chibardun out by refusing to grant excavation permits unless Chibardun accepts onerous conditions which far exceed the requirements of the City's existing ordinances, and which never have been imposed upon GTE and other existing utilities and permittees. In contrast, Barron welcomed telecommunications competition, and proceeded to grant local permits in time for Chibardun to build its proposed Barron system during the warm weather construction season of 1997. As a result, Chibardun has been providing competitive telecommunications services in Barron since November 24, 1997 (Exhibit A).

Whereas critics inside and outside Congress have descried the failure to date of the Telecommunications Act of 1996 (1996 Act) to generate the competition that it promised, Chibardun stands ready, willing, and able to bring facilities-based competition to Rice Lake **if only** the City would grant excavation permits according to the schedules, fees and conditions available under its existing ordinances and procedures to GTE and others. The City's efforts to delay, discourage and deny Chibardun's entry constitute the very

¹ Chibardun also proposed to construct cable television systems to compete with the existing Marcus Cable systems in Rice Lake and Barron.

sort of entry prohibitions that Sections 253(a) and 253(d) of the Act were enacted to preempt.

The need for Commission preemption of the City's entry blocking efforts is eloquently stated by Mr. Burnell Hanson, a Rice Lake resident and business owner, in comments which he filed personally in this docket. Mr. Hanson asks the Commission to end the City's efforts ("for reasons unclear to our residents") to prevent Chibardun "from doing business in Rice Lake," and to allow Rice Lake residents to have a "choice of services for phone and cable." AT&T Corp. (AT&T), MCI Telecommunications Corporation (MCI) and the United States Telephone Association (USTA) also support preemption. Even GTE Service Corporation (GTE) recognizes that substantial aspects of the City's treatment of Chibardun constitute prohibited barriers to competition. However, GTE seeks to delay relief to Chibardun (and thereby extend the life of its own Rice Lake local exchange monopoly) by requesting dismissal of Chibardun's petition as "premature." Finally, the City, League of Wisconsin Municipalities (League) and CMMT Communities (CMMT) oppose Chibardun's preemption request.

CLARIFICATION OF FACTS

Various City factual allegations differ in substantial respects from those of Chibardun. In addition, the City has pointedly questioned Chibardun's motives, and the accuracy and veracity of some of its statements. Before proceeding further, Chibardun clarifies the following facts: (1) Chibardun has not

withdrawn its May 19, 1997 applications to the City for excavation permits, nor has it received any indication that the City has dismissed the applications; (2) Chibardun reasonably expected the City to process its excavation permit applications under the existing ordinances, practices and procedures applied to GTE and numerous other utilities and entities; (3) Chibardun has not been "welcomed" by the City, but rather has been delayed and discouraged by the City at every step of its effort to enter Rice Lake; (4) Chibardun did not file its Rice Lake permit applications "too late" for construction during the 1997 season; (5) the "License Agreement" which the City proposed as a precondition to its processing of Chibardun's excavation permit applications would impose obligations and restrictions far in excess of the requirements of existing Rice Lake ordinances; and (6) the City has allowed GTE and Marcus Cable to upgrade their systems while denying entry to Chibardun.

1. Chibardun's Permit Applications Remain Pending

On May 19, 1997, Chibardun filed applications with the Rice Lake Street Department for six "Permit(s) For Excavation Of Streets, Alleys, Public Ways And Grounds" to bury cable at specified locations within Rice Lake (Exhibit B, engineering drawings not included). The applications were accompanied by a check from Chibardun in the amount of sixty dollars (\$60.00) to cover the City's stated fee of ten dollars (\$10.00) per application/permit Exhibit C.

Chibardun has never withdrawn these applications, nor has it

ever been notified by the City or the Street Department that the applications have been denied, rejected or dismissed. Neither the applications nor the fee check have ever been returned to Chibardun by the City or the Street Department.

Chibardun's June 9, 1997 letter to the City (City Opp., Att. A, Ex.3) did not withdraw its excavation permit applications. The letter was not written to the Street Department before which the applications were pending, and made no express or implied reference to any withdrawal of Chibardun's pending permit applications. Rather, it expressed to the Mayor and the City Administrator the reality that the numerous onerous, additional and unacceptable requirements proposed in the City's "License Agreement" had extinguished Chibardun's last hope that equipment purchases and construction contracts could be finalized in time to construct its Rice Lake system during the 1997 construction season.

For those burying underground facilities in Rice Lake and other northern Wisconsin communities, the critical fact of life is that the long, cold winters and frozen ground conditions limit the annual underground construction season to the period from May 1 to November 15. In order to construct sufficient facilities by November 15, 1997, to commence operations in Rice Lake during 1997, Chibardun needed to finalize its equipment purchases and contractor arrangements by June 1, 1997 and to begin actual construction by July 1, 1997. When it received and reviewed the City's June 6, 1997 "License Agreement," Chibardun realized that the City's demands went even further beyond the scope of the City's existing

requirements than it had expected, and that it would be impossible at that late date to obtain excavation permits and finalize equipment and contractor arrangements in time for construction during the 1997 season. Chibardun wrote its June 9, 1997 letter to express its frustration and disappointment with the City's extreme demands and delays, and to try to convince the Mayor and the City Administrator that the City's recalcitrance was delaying for at least a year the telecommunications competition wanted by many Rice Lake residents.

As of the present date, Chibardun's excavation permits remain pending before the Street Department. They can be granted in their present form -- with the only modification needed (as a result of the City's lengthy processing delay) being a change of the completion date from November 15, 1997 to November 15, 1998. Grant of the permits at this time would permit Chibardun to make the necessary equipment and contractor arrangements during early 1998, and to commence construction promptly when the ground thaws in May, 1998.

2. Chibardun Reasonably Expected Prompt Grant Of Its Permit Applications

Exhibit D contains copies of the ninety-eight (98) excavation permit applications granted by the City during the first ten months of 1997. These documents, which were obtained from the City's Street Department, show very clearly why Chibardun expected its permit applications to be granted shortly after their May 19, 1997 submission.

The most striking characteristic of the 1997 Rice Lake permits

is that **virtually every single one** was granted on the **very same day** the application was submitted. One application (Permit No. 1899) was granted the day after it was filed, while another (Permit No. 1892) is shown as granted on October 9, 1997, four days **prior** to its October 13, 1997 filing. The only other possible exceptions to the City's "same day grant" practice were three permits with uncompleted application dates (Permit Nos. 1798, 1850 and 1871).

A second characteristic of the Rice Lake permits is that virtually none were signed personally by Gary G. Neuman, the City's Superintendent of Streets. Rather, almost all of the granted permits were signed with Mr. Neuman's name by Street Department employees having the initials "jm" and "st." The City's practice of processing and granting excavation permits to existing utilities and private contractors in ministerial or "rubber stamped" fashion on a same day basis throughout 1997 while Chibardun's applications have remained pending offers no indication of the pre-grant investigations, advance scheduling and construction oversight that the City now claims are necessary for Chibardun.

A third characteristic of the Rice Lake permits is that they were issued to **nineteen** different entities -- four utilities (GTE, Wisconsin Gas Company, Rice Lake Water Utility and Rice Lake Electric Utility), as well as fifteen private contractors or entities (Del's Excavating & Trucking; B&D Services; H&E, Inc.; L&L Excavating; STAAB; Kirkhof Plumbing; Antczak Construction; Big Bike Parts; Certified Inc.; Mancl R&M Excavating; Meyers Electric; Leroy Zingler; Alan Klas; F. Daniel Mani; and Earthmovers Inc.). The

number and variety of these permittees undermines the City's assertions that it needed to reassess its existing right-of-way regulations when Chibardun announced its entry plans because previously "there were few entities seeking such use" (City Opp., p. 6). Rather than dealing with "only one telecommunications provider accessing City rights-of-way" (Id., p. 5), the City has in fact been managing the use of rights-of-way under its existing ordinances by at least four utilities and numerous other entities. Put simply, the City's 1997 permits show that Chibardun's proposed entry would not stretch the City's existing ordinances, procedures and resources to the limit by forcing a quantum leap from "one" to "two" in the number of right-of-way users the City must regulate. Rather, Chibardun would be the fifth (or sixth, if one counts Marcus Cable) utility-type user in Rice Lake, and the twentieth or twenty-first permittee overall.

Fourth, the Rice Lake permits indicate that GTE, the City's existing local exchange monopoly, received at least three excavation permits (Permit Nos. 1809, 1852 and 1899) during 1997. Two of these authorizations (Permit Nos. 1852 and 1899) were sought and granted promptly on a same day or next day basis after May 19, 1997, while Chibardun's applications were being held in limbo. One of the GTE permits (Permit No. 1852) contains an open completion date.

Fifth, the Rice Lake permits indicate that all applicants were charged a permit fee of ten dollars (\$10.00), and that all permits were granted with no restrictions or obligations other than those

set forth in existing City ordinances. There is no indication that the City attempted to require any applicant other than Chibardun to pay a fee of ten thousand dollars (\$10,000.00), or to sign "license agreements" containing reimbursement, indemnification, insurance, advance scheduling, free City access to facilities, and other restrictions and obligations in excess of those in existing City ordinances.

Finally, the Rice Lake permits show that the City's permit process was a very informal one -- both before and after the May 19, 1997 Chibardun filings -- and that requirements were often relaxed or ignored to accommodate applicants. For example, many applications appear to have been taken over the telephone by Street Department employees, who appear then to have completed and granted the applications without obtaining signatures from authorized representatives of the applicants (Permit Nos. 1810, 1813-18, 1821, 1853 and 1859-63). Other permits appear to have been granted routinely with open or unspecified completion dates (Permit Nos. 1852, 1873, 1875, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886 and 1887).

In sum, Exhibit D depicts the normal excavation permit procedures and practices followed by the City during 1997, both before and after Chibardun's May 19, 1997 applications were submitted. Had the City applied these procedures and practices to Chibardun's applications, Chibardun would have received its permits on May 19 or 20, 1997, and would have been able to construct and commence operation of its Rice Lake telecommunications system

during 1997. The City's refusal to follow its existing requirements and procedures in Chibardun's case has directly prohibited Chibardun from providing telecommunications services in Rice Lake during 1997 and most of 1998, and threatens to prohibit Chibardun from doing so in future years.

3. The City has Not Welcomed Chibardun

Contrary to its claims, the City has not "welcomed" telecommunications competition to Rice Lake (City Opp., pp. 3, 5) in any normal sense of the word. Chibardun could not feel any more unwelcome, as it has been on the receiving end of a variety of City efforts (including consultant studies, requests for irrelevant and unnecessary information, future and interim ordinances, and "license agreements" imposing additional and excessive restrictions and obligations) to block, delay and discourage its entry.

Chibardun does not believe that it has misconstrued or misunderstood the City's attitude. Mr. Hanson, a Rice Lake resident, has also determined that the City "for reasons unclear to our residents" has prevented Chibardun from doing business in Rice Lake. Likewise, the attached cartoon from the Rice Lake Chronotype (Exhibit E) graphically depicts the local perception in Rice Lake of the insincerity of the City's claims that it has "welcomed" Chibardun to town.

The City's hostility to Chibardun is demonstrated by the tone of its opposition -- particularly its conjectures that Chibardun's excavation permit applications were not filed and prosecuted in "good faith," but rather constituted an attempt to "set the City

up" and "create a record" for the present preemption proceeding (City Opp., pp. 16-17).

Chibardun can assure the Commission and the City that the very last thing that it wanted was to become embroiled in a dispute with the City, and to file and prosecute the present preemption petition. Chibardun has operated in northwestern Wisconsin since 1907, and presently provides telecommunications and cable television services in the nearby communities of Dallas (15 miles from Rice Lake), Cameron (3 miles away), Barron (5 miles away), Almena (15 miles away), Prairie Farm (20 miles away), Ridgeland (20 miles away) and Sand Creek (22 miles away). Its only goal in Rice Lake has been to offer competitive services to local residents as soon as possible. Chibardun wants nothing more than to develop the same civil and cooperative relationship with the City that it maintains with the governments of the other neighboring communities it serves.

The proof of Chibardun's intentions and good faith is its record in Barron. Chibardun approached Barron in March, 1997, at almost the same time it approached the City. However, unlike the City, Barron actually welcomed competition, and processed the necessary local authorizations under its existing ordinances in time for construction to be undertaken and completed during the 1997 season. Specifically, Chibardun filed its excavation permit applications in Barron on June 4, 1997 (three weeks after its Rice Lake filing); had its applications processed and reviewed by the Barron Street Department during the next three and one-half weeks;

and received grant of the necessary excavation permits on July 3, 1997. Chibardun began construction of its Barron system on July 7, 1997²; completed construction on November 17, 1997; and commenced service to its first Barron telephone customer on November 24, 1997 (Exhibit A).

**4. Chibardun Did Not File Its
Rice Lake Applications "Too Late"**

The City claims that Chibardun applied for its excavation permits "too late," and that Chibardun should not have had the "absurd notion" that its applications would be granted promptly without evaluation (City Opp., pp. 16-17).

Chibardun had discussed the excavation permit process with the Rice Lake City Administrator on March 13, 1997 and with the Rice Lake Superintendent of Streets on May 14, 1997, and had no reason to believe that the filing of its applications on May 19, 1997³ was "too late" with respect to its proposed July 1, 1997 construction start-up. As evidenced in Exhibit D, the standard practice of the Street Department during 1997 was to grant permits on a "same day" basis.

² At the May 13, 1997 Rice Lake City Council meeting, Rice Lake cable Director Mick Givens argued that the City needed to adopt a telecommunications ordinance to control Chibardun because it could conceivably close down Main Street during the Fourth of July. The possibility that a firm competing for local customers would deliberately disrupt a community's Fourth of July festivities is too remote for comment.

³ As indicated above, Chibardun did not apply for excavation permits in Barron until June 9, 1997 (three weeks after Rice Lake), but was able to have its applications processed and granted by July 3, 1997.

Rather, timing became an issue because of the City's departure from the permit practices and procedures developed under its existing ordinances. By letter of May 23, 1997 (Exhibit F), the City Administrator informed Chibardun that the City was reviewing its permit applications and intended to act upon them "in due course" (rather than its normal "same day" basis). The letter declared that "the City intends to develop and adopt a telecommunications ordinance regulating the use of public rights-of-way by telecommunications service providers" and that it wanted to negotiate a "permit and license agreement" with Chibardun in the meantime.

The City Administrator informed Chibardun's General Manager during a meeting earlier the same day (May 23, 1997) that the "future telecommunications ordinance" was being developed because Chibardun wanted to come to the City. The City had previously employed the tactic of initiating a "study" of future cable needs and competition to delay indefinitely Chibardun's proposal to construct and operate a competitive cable system in Rice Lake⁴.

⁴ The City attempts to characterize its opposition to Chibardun's cable proposals as a case of Chibardun being unwilling to accept the same franchise terms as Marcus Cable and demanding more favorable terms (City Opp., p. 1 n.5). However, Chibardun proposed from the beginning to accept the very same cable franchise as Marcus Cable with two minor exceptions (a three-year build-out period and an office three miles away) -- one of which (the office three miles away) was soon dropped. However, even though the City Cable Director agreed that Chibardun's three-year construction proposal was not a problem (*Id.*, Att. B, Ex. 4, p. 2), the City nonetheless refused to grant Chibardun a competing cable franchise and has delayed Chibardun's entry by turning the matter of competitive cable franchises over to a consultant for "study" since May 13, 1997.

Finally, the City Administrator's letter requested extra-neous "further information" regarding Chibardun's proposed telecommunications system, including: (a) a description of the proposed network; (b) a construction timetable; (c) a statement of the projected service dates; (d) a statement regarding the nature of the telecommunications services to be provided, operating territory and proposed charges; (e) evidence that Chibardun has obtained the requisite approvals from the Public Service Commission of Wisconsin (WPSC); and (f) a statement regarding the need to negotiate an interconnection agreement with GTE (Exhibit F).

Neither the City's existing ordinances nor its permit applications request this additional information. It does not appear that the City has ever sought similar information from GTE, much less delayed the processing of GTE permit applications in order to request it.

Finally, the engineering drawings accompanying Chibardun's permit applications were wholly sufficient to describe the nature and locations of the proposed excavations. The City has not requested any additions or modifications to these engineering drawings, nor indicated what relevance the additional service, rate, and interconnection information might have with respect to its management of rights-of-way.

5. The City's License Agreement Is A Prohibited Barrier To Entry

The License Agreement proposed by the City on June 6, 1997 as a condition for grant of Chibardun's excavation permits (Exhibit G) is so onerous as to constitute, in itself, a prohibitive barrier

to entry by newcomers into the Rice Lake market. The agreement would impose additional obligations and restrictions upon Chibardun that far exceed the requirements in Rice Lake Code Sections 6-2-3 and 6-2-4 (Exhibit H) and other existing City ordinances, many of which have little or no relevance to the City's right-of-way management interests. Similar obligations and restrictions have never been imposed upon GTE or other excavation permittees. The most prohibitive obligations and restrictions include:

1. Chibardun must pay the City a \$10,000.00 "administrative fee" for the drafting and processing of the License Agreement (Section 14). In contrast, GTE and other excavation permit applicants are required to pay only a \$10.00 permit fee under Rice Lake Code Section 6-2-3(b).
2. Chibardun must reimburse the City for "any and all" costs the City incurs for review, inspection or supervision of Chibardun's activities under the Agreement or under "any other ordinances" for which a permit fee is not established (Section 14). Contrary to the City's assertions (City Opp., pp. 47-8), there is nothing in the provision limiting the "any and all costs" that the City might generate or incur, or indicating any intent by the City to credit any of these payments against future occupancy fees. Neither GTE nor other permittees have any similar, open-ended "reimbursement" obligations under existing City ordinances.
3. Chibardun must submit a specific annual construction plan and schedule, and a tentative three-year construction plan and schedule, before beginning construction of any part of its network (Section 9a). This type of advance information is not (and has never been) needed by the City to coordinate construction projects or right-of-way usage. Rather, the 1997 excavation permits in Exhibit D show that the City has required no more than several days' or weeks' advance notice of excavations under its existing ordinances. In contrast, the required filing of one-year and three-year construction plans and schedules would tilt the competitive playing field almost vertically against newcomers and in favor of incumbents. It would constitute invaluable intelligence for an incumbent like GTE, by giving it advance knowledge of Chibardun's future construction and service plans, plus more than sufficient time to counter them.

4. Chibardun must also submit a list of its independent contractors and a description of their work, before beginning construction of any part of its network (Section 9b). Again, this type of advance information is not (and has never been) needed by the City to coordinate construction projects or right-of-way usage. On the other hand, it gives local or regional monopolies an invaluable opportunity to hire away or scare off a new entrant's proposed contractors. This is not an idle or theoretical concern, for Chibardun has recently received (and is investigating) reports that a certain cable operator has threatened to "blackball" contractors who participated in the construction of a Chibardun facility.
5. Chibardun must indemnify not only the City but also City officials, employees, agents, contractors and attorneys against any liability (including payment of legal fees of counsel selected by the City) for personal or property injuries "arising in any way" from the operation, maintenance or use (as well as the construction or removal) of its facilities, including claims resulting from the negligence or contributory negligence of the City personnel themselves and from alleged injuries from exposure to electromagnetic fields (Section 19). In contrast, Rice Lake Code Section 6-2-4(c)(2) requires GTE and other permittees to indemnify the City only against claims resulting from the negligence of the permittee or its employees relating to the authorized construction. With all due respect to the City, the unlimited Section 19 indemnification requirement which it seeks to impose upon Chibardun is neither reasonable nor standard. If accepted, it would create such a large and unlimited potential liability that Chibardun could be placed in violation of its existing loan covenants, and would be precluded indefinitely from obtaining additional financing from private or government sources. Moreover, the protection of City personnel from their own negligence and contributory negligence, as well as the electromagnetic exposure provisions, have no perceptible relationship to the City's management of rights-of-way. Finally, the provision expressly states that Chibardun's indemnification obligation would survive termination of the License Agreement, and therefore would subject Chibardun to progressively more onerous potential liabilities than not only existing permittees but also entities regulated by the City's future ordinance.
6. Chibardun must obtain substantially greater and more expensive insurance coverage (Section 20) than GTE and other permittees are required to obtain under existing Rice Lake Code Section 6-2-3(c):

<u>Coverage</u>	<u>Chibardun</u>	<u>GTE</u>
Bodily injury		
Per person	\$500,000	\$100,000
Per occurrence	\$1,000,000	\$300,000
Property injury	\$1,000,000	\$50,000
Umbrella liability	\$4,000,000	None

7. Chibardun must relocate or remove its telecommunications facilities, at its own expense, from any right-of-way at the request of the City (Section 12), and upon termination by the City of its license (Section 17). In the latter instance, the City attempts to seize the power to determine the future owner of the facilities by "excusing" Chibardun from the removal obligation "if [it] sells its facilities to another Telecommunications Provider, subject to the City's prior written approval" (Section 12). In contrast, the existing Rice Lake ordinances place no comparable relocation, removal or prior transfer approval obligations upon GTE or other existing permittees.
8. Chibardun must allow the City to use the surplus space on its poles, conduits and other structures free of charge, and is prohibited from removing such facilities without sixty days prior written notice to the City (Section 18). This is not a form of right-of-way management, nor does the City presently assess any type of recurring charge for which such free usage would substitute as a form of "in kind" compensation. In contrast, existing Rice Lake ordinances impose no comparable "free usage" obligation upon GTE or other existing permittees.
9. Chibardun must provide the City with an irrevocable letter of credit in the amount of \$50,000 to ensure performance of all of Chibardun's obligations (Section 18). In contrast, existing Rice Lake ordinances do not require GTE or other excavation permit applicants to provide similar letters of credit or performance bonds.

Whether considered separately or cumulatively, these obligations and restrictions impose large or unlimited expenses and potential liabilities upon new entrants like Chibardun, and confer substantial economic and informational advantages upon incumbents like GTE. They, therefore, constitute the very type of entry

barriers prohibited by Section 253(a) of the Act. Even GTE has noted that many of the City's proposed additional requirements do not comport with Section 253(a) (GTE Comments, pp. 9-10).

**6. The City Has Allowed GTE And Marcus Cable
To Upgrade Their Systems While Refusing
Entry To Chibardun**

The City charges that Chibardun has "misrepresented" that the City has allowed GTE and Marcus Cable to proceed with plans to upgrade their systems while denying entry to Chibardun (City Opp., p. 7 at n.4).

As indicated in Exhibit D, the City has granted three excavation permits (Permit Nos. 1809, 1852 and 1899) to GTE during the first ten months of 1997, including two permits on a same day or next day basis (Permit Nos. 1852 and 1899), while Chibardun's applications were held up. In addition, during late June and July, 1997, GTE constructed a new underground fiber optic, interoffice facility between Rice Lake and Barron to upgrade its service in both communities. While much of the construction was along State Routes 48 and 25, GTE located its Rice Lake origination/termination point for the upgraded facility east of West Avenue, approximately one-half mile within the Rice Lake city limits. Although this GTE upgrade entailed substantial excavation and construction within the Rice Lake city limits, Chibardun has found no indication in the City's permit records Exhibit D, that the City required any excavation permits from GTE, nor that the City regulated or delayed the GTE upgrade in any manner.

The City's opposition itself indicates that it is permitting

Marcus Cable to proceed with an upgrade of its Rice Lake cable system (City Opp., pp. 22-3). Whereas the City refused to process and grant Chibardun's excavation permit applications until **after** it entered into a "License Agreement," the City has granted several excavation permits to Marcus Cable for its upgrade **before** the purported "Permit Agreement" was signed. Exhibit I contains copies of four recent excavation permits (Permit Nos. 1905, 1906, 1908 and 1955) which the City granted to Marcus Cable on a same day or next day basis between October 28 and November 12, 1997. However, as of the December 2, 1997 filing date of its opposition, the City does not appear to have a completed and signed "Permit Agreement" with Marcus Cable.

Even if a signed "Permit Agreement" is eventually completed and produced, there are serious questions whether and how it will be enforced. For example, will the \$10,000 agreement fee and cost reimbursements actually be paid by Marcus Cable, or will they be excused as supervision of "activities for which a permit fee [that is, Marcus Cable's franchise fee] is established"? In other words, will these charges simply be treated as an offset against cable franchise fees that Marcus Cable would have paid in any event? Likewise, how will the insurance and indemnification requirements be enforced if the subject excavations are completed (see November, 1997 completion dates of permits in Exhibit I) before the "Permit Agreement" is signed?

Chibardun does not believe that the purported "Permit Agreement" will be implemented or enforced against Marcus Cable in its

present form. GTE has recognized and conceded that many of the provisions of the "License Agreement" are onerous and unreasonable, and are subject to Section 253(a) preemption (GTE Comments, pp. 9-10). Moreover, the City itself argues both sides of the question when it represents that it is imposing "substantively identical" conditions upon Marcus Cable as it had proposed to place upon Chibardun (City Opp., p. 23), while claiming that the "License Agreement" was merely a "proposal" presented in "draft form" that Chibardun was not required "to sign as is" (Id., p. 19).

ARGUMENT

I. CHIBARDUN'S PREEMPTION PETITION SHOULD NOT BE DISMISSED OR DENIED ON PROCEDURAL GROUNDS

Contrary to the City's claims, the Commission has jurisdiction under Sections 253(a) and 253(d) of the Act to preempt the City's prohibition of Chibardun's ability to provide telecommunications service in Rice Lake. Chibardun is the directly injured potential entrant having standing to request such preemption. Likewise, Chibardun's petition should not be dismissed as premature, as requested by GTE, on the ground that a permanent Rice Lake right-of-way ordinance may be in place when the ground thaws for construction in the Spring of 1998.

A. The Commission Has Jurisdiction Under Sections 253 (a) And 253(d) Of The Act To Preempt The City's Denial Of Entry By Chibardun Into Rice Lake

Section 253(a) of the Act declares that "[n]o state or local statute or regulation, or other state or local requirement, may

prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Section 253(d) provides that, if "the Commission determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a)," the Commission "shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d).

Contrary to the City's characterization, Chibardun's preemption claim is not solely or primarily a dispute arising "out of public right-of-way management and compensation matters" (City Opp., p. 24). Rather, Chibardun's preemption claim is based upon the fact that the City unlawfully has refused to grant the excavation permits necessary for it to provide telecommunications service in Rice Lake: (a) even though its applications were fully in compliance with Rice Lake Code Sections 6-2-3 and 6-2-4 and other City requirements in effect at the time they were filed on May 19, 1997; and (b) even though virtually all such permit applications were granted on a "same day" basis under the procedures and practices followed by the City's Street Department during the periods before and after May 19, 1997.

Chibardun does not challenge or seek preemption of the provisions of Rice Lake Code Sections 6-2-3 and 6-2-4, the substantive City right-of-way management and compensation